

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte THERESA C. GESSE

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Appeal No. 1998-3296  
Application No. 08/681,857<sup>1</sup>

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ON BRIEF

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Before MEISTER, FRANKFORT, and NASE, Administrative Patent Judges.

NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 2, 5 through 8, 11 and 12. Claim 13 has been withdrawn from consideration under 37 CFR § 1.142(b) as

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<sup>1</sup> Application for patent filed July 29, 1996. According to the request for filing a patent application under 37 CFR § 1.60 (Paper No. 2, filed July 29, 1996), the application is a continuation of Application No. 08/394,498, filed February 27, 1995, now U.S. Patent No. 5,539,939.

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being drawn to a nonelected invention. Claims 1, 3, 4, 9 and  
10 have been canceled.

We REVERSE.

BACKGROUND

The appellant's invention relates to a bath chair. An understanding of the invention can be derived from a reading of exemplary claim 8, which appears in the appendix to the appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Raeder 1968	3,364,504	Jan. 23,
Harmony, III	4,074,370	Feb. 21, 1978
Stevens	Des. 330,461	Oct. 27, 1992
Eder 1992	4,113,105 <sup>2</sup>	Oct. 29,
	(Germany)	

The claims on appeal stand rejected under 35 U.S.C. § 103 on the following grounds:

(1) Claims 5 through 8, 11 and 12 as being unpatentable over Raeder in view of Harmony;

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<sup>2</sup> In determining the teachings of Eder, we will rely on the translation provided by the PTO. A copy of the translation is attached for the appellant's convenience.

(2) Claim 2 as being unpatentable over Raeder in view of  
Harmony and Eder; and

(3) Claims 2, 5 through 8, 11 and 12 as being unpatentable  
over Stevens in view of Raeder.

Rather than reiterate the conflicting viewpoints advanced  
by the examiner and the appellant regarding the above-noted  
rejections, we make reference to the examiner's answer (Paper  
No. 15, mailed May 28, 1998) for the examiner's complete  
reasoning in support of the rejections, and to the appellant's  
brief (Paper No. 14, filed April 27, 1998) for the appellant's  
arguments thereagainst.<sup>3</sup>

#### OPINION

Initially we note that the issues (G), (H) and (I) as set  
forth and argued on pages 5 and 8-10 of the appellant's brief  
relate to petitionable matters and not to appealable matters.

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<sup>3</sup> Since the other ground of rejection (i.e., the rejection  
of claim 11 under 35 U.S.C. § 112, second paragraph) set forth  
in the final rejection (Paper No. 9, mailed October 20, 1997)  
was not set forth in the examiner's answer we assume that this  
other ground of rejection has been withdrawn by the examiner.  
See Ex parte Emm, 118 USPQ 180, 181 (Bd. App. 1957).

See Manual of Patent Examining Procedure (MPEP) §§ 1002 and 1201. Accordingly, we will not review these issues.

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. Upon evaluation of all the evidence before us, it is our conclusion that the evidence adduced by the examiner is insufficient to establish a prima facie case of obviousness with respect to the claims under appeal. Accordingly, we will not sustain the examiner's rejection of claims 2, 5 through 8, 11 and 12 under 35 U.S.C. § 103. Our reasoning for this determination follows.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that would have led one of ordinary skill in the art to combine the

relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) and In re Lintner, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

### **Rejections (1) and (2)**

We will not sustain the rejection of claims 5 through 8, 11 and 12 under 35 U.S.C. § 103 as being unpatentable over Raeder in view of Harmony. Likewise, we will not sustain the rejection of claim 2 under 35 U.S.C. § 103 as being unpatentable over Raeder in view of Harmony and Eder.

It is our opinion that even if the bathtub of Raeder were provided with a backrest as taught by Harmony's backrest 60 and ridges as taught by Eder's ridges 24, one would not have arrived at the claimed invention. In that regard, we agree with the appellant's argument (brief, pp. 6-7) that the claimed broad, planar, unobstructed platform portion capable of comfortably supporting the buttocks of the bather when seated thereon as recited in independent claims 8 and 11 is not readable on terminal portion 11 of Raeder's bathtub 3.

Additionally, the modified device of Raeder would still be a bathtub and thus would not be readable on being "a bath chair" as recited in the claims under appeal.

Since all the limitations of the claims under appeal are not suggested by the applied prior art for the reasons set forth above, the decision of the examiner to reject claims 2, 5 through 8, 11 and 12 under 35 U.S.C. § 103 is reversed.

**Rejection (3)**

We will not sustain the rejection of claims 2, 5 through 8, 11 and 12 under 35 U.S.C. § 103 as being unpatentable over Stevens in view of Raeder.

It is our opinion that even if the bathing chair of Stevens were provided with a forward terminal portion as suggested by Raeder's forward terminal portion 11, one would not have arrived at the claimed invention. In that regard, we agree with the appellant's argument (brief, p. 8) that the claimed broad, planar, unobstructed platform portion capable of comfortably supporting the buttocks of the bather when seated thereon as recited in independent claims 8 and 11 is not readable on terminal portion 11 of Raeder's bathtub 3. Additionally, we fail to see any motivation, absent impermissible hindsight, to have provided the bathing chair of Stevens with a forward terminal portion as taught by Raeder's forward terminal portion 11.<sup>4</sup>

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<sup>4</sup> The use of such hindsight knowledge to support an obviousness rejection under 35 U.S.C. § 103 is, of course, impermissible. See, for example, W. L. Gore and Associates,  
(continued...)



Since all the limitations of the claims under appeal are not suggested by the applied prior art for the reasons set forth above, the decision of the examiner to reject claims 2, 5 through 8, 11 and 12 under 35 U.S.C. § 103 is reversed.

CONCLUSION

To summarize, the decision of the examiner to reject claims 2, 5 through 8, 11 and 12 under 35 U.S.C. § 103 is reversed.

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<sup>4</sup>(...continued)  
Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

REVERSED

JAMES M. MEISTER	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
CHARLES E. FRANKFORT	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
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	)	
JEFFREY V. NASE	)	
Administrative Patent Judge	)	

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APJ NASE

APJ MEISTER

APJ FRANKFORT

DECISION: **REVERSED**

Prepared By: Gloria Henderson

**DRAFT TYPED:** 26 May 99

**FINAL TYPED:**